of statutory construction of giving effect to legislative intent and carrying out the purposes of the act,[16] our court seems correct in ignoring the clause as adding nothing, but only expressing in another way the limitation that the injury must "arise out of and in the course of employment." To seize upon "proximate cause" and torture out of it some rigid rule or test of the law of torts would be to lose sight of the legislative intent to insure the employee against injury from employment apart from any tort liability, and would only delay determining for what injuries compensation should be given.

A. W. B.

WORKMEN'S COMPENSATION: EMPLOYER AND EMPLOYEE: INDEPENDENT CONTRACTOR.—That liability under workmen's compensation acts in most states[1] extends against the employer only in favor of a workman, servant, or employee as distinguished from an independent contractor, is of course well settled.[2] California's new act, which went into effect January 1, 1918, specifically excludes independent contractors from its scope.[3] Under former acts the Supreme Court of California held that the Industrial Commission did not have jurisdiction to award compensation to independent contractors.[4] A defence frequently urged, as it was in the case of *Easton v. Industrial Accident Commission*,[5] against compensation is, therefore, that the injured party was an independent contractor.[6] The question presented in such cases is whether the party injured bore the legal relation of independent contractor toward another for whom he was performing work, or whether the legal relationship of employee and employer existed so as to

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[16] Burr v. Dana (1863), 22 Cal. 11, 20; Atkins v. Disintegrating Co. (1873), 18 Wall., 272, 310, 21 L. Ed. 844; U. S. v. Freeman (1845), 3 How. 563, 11 L. Ed. 727; Sutherland on Statutory Construction § 254.

[1] Vermont, Massachusetts and Illinois are among the few states having peculiar statutes in that the line of their application is drawn on some other distinctions than that of employee or servant as distinguished from an independent contractor. Packett v. Moretown Creamery Co. (Vt. 1917), 99 Atl. 638; White v. Geo. A. Fuller Co. (Mass. 1917), 114 N. E. 829; Parker-Washington Co. v. Ind. Board (1916), 274 Ill. 498, 113 N. E. 976.

[2] Carstens v. Pillsbury (1916), 172 Cal. 572, 158 Pac. 218; Western Indemnity Co. v. Pillsbury (1916), 172 Cal. 807, 159 Pac. 721; Columbia School Supply Co. v. Lewis (Ind. 1917), 115 N. E. 103.

[3] Cal. Stats. 1917, ch. 586, § 8 (b). Although excluding independent contractors from its provisions in a general way, this act in its operation will be broader than a workmen's compensation act, and will include some who are, on principle, independent contractors, for it excludes manual laborers from the class of independent contractors even when free from control.

[4] Western Indemnity Co. v. Pillsbury, n. 2, supra; Carstens v. Pillsbury, n. 2, supra.

[5] (July 14, 1917), 25 Cal. App. Dec. 145, 167 Pac. 288. Rehearing denied by the Supreme Court Sept. 11, 1917.

[6] This defence was urged in all cases cited in these notes.

make the compensation law apply. The terms "employee" and "workman" are on the whole synonymous in compensation cases,[7] as are the terms "employee" and "servant."[8] Section 2009 of the California Civil Code[9] has been applied by the Industrial Accident Commission and the courts as embodying a proper definition of the term employee as used in the California Compensation Act of 1913.[10] It follows, therefore, that the element of personal service must be present in a case of employer and employee.[11] But still, when is one rendering personal service as a servant and when is he an independent contractor?

It has been generally conceded that no exact and universal test can be formulated to distinguish a servant or employee from an independent contractor.[12] The authorities on the whole,[13] however, have always recognized the degree of control which the person for whom the work was being done had the right to exercise over the person performing the work as the most important and the most nearly conclusive test.[14] Some recent cases have even shown a tendency to adopt the test of control as con-

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[7] Deyo v. Ariz. Grading & Construction Co. (1916), 18 Ariz. 149, 157 Pac. 371.

[8] Western Ind. Co. v. Pillsbury, n. 4 supra; Tex. Life Ins. Co. v. Roberts (1909), 55 Tex C. A. 217, 119 S. W. 926.

[9] § 2009 defines a servant as "One who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Under the new compensation act the term "servant" will be made still broader, it seems, so as to include some who might at common law be considered independent contractors, n. 3, supra.

[10] McCoy v. Kirkpatrick (1914), 1 I. A. C. 599; Western Ind. Co. v. Pillsbury, n. 4 supra; Claremont Country Club v. Ind. Acc. Com. (1917), 53 Cal. Dec. 205, 163 Pac. 209. Pennsylvania makes the term "servant" and "employee" synonymous by express provision of statute, (1915), P. L. 736, § 104. Some old cases limited the term servant as applying to menial laborers only, Cocking v. Ward (1898), 48 S. W. 287.

[11] Western Ind. Co. v. Pillsbury, n. 4 supra; McCoy v. Kirkpatrick, n. 10 supra; Donlon Bros. v. Ind. Acc. Com. (1916), 173 Cal. 250, 159 Pac. 715; Employers' Indemnity Co. v. Kelly Coal Co. (1912), 149 Ky. 712, 149 S. W. 992.

[12] Labatt, Master and Servant, Vol. 1 (2nd ed.) § 2; McCoy v. Kirkpatrick, supra, n. 10; Bodwell v. Webster (1915), 98 Neb. 664, 154 N. W. 229.

[13] Corbin v. Am. Mills (1858), 27 Conn. 274, 71 Am. Dec. 63, tried to distinguish between agency and control.

[14] Shearman & Redfield, Negligence (5th ed.), § 165; Thompson, Negligence (2nd ed.), § 622; Honnold, Workmen's Compensation, § 66; Slycord v. Horn (Iowa, 1917), 162 N. W. 249; Powley v. Vivian & Co. (1915), 169 App. Div. 170, 154 N. Y. Supp. 426; Chicago R. I. & P. R. R. Co. v. Bond (1916), 240 U. S. 449, 60 L. Ed. 735, 36 Sup. Ct. Rep. 403; Bodwell v. Webster, n. 12, supra; Emmerson v. Fay (1896), 94 Va. 60, 26 S. E. 386; McCoy v. Kirkpatrick, supra, n. 10; Western Indemnity Co. v. Ind. Acc. Com., n. 5, supra; Brown v. Ind. Acc. Com. (1917), 51 Cal. Dec. 249, 163 Pac. 664. The amended Cal-

clusive.[15] This seems correct. All the circumstances of the case, however, must be considered before the court can decide whether the injured party was subject to such control. But it is misleading and confusing to consider each circumstance of the case as the basis of an independent test, and not as evidence bearing on the essential point to be decided, viz., whether the injured person was a "servant" subject to control, or an "independent contractor" following his own will as to his methods of work.[16] It should be remembered at this point that the control spoken of is not necessarily actual direction, but the right to direct;[17] that limited control by a third party does not disturb the relationship of master and servant;[18] and that a certain amount of freedom of action is inherent in the doing of all work, varying in degree with its nature.[19] A distinction must also be drawn between the control of the methods and details of doing the work and the supervision of the result,[20] for one may be an independent contractor, though the proprietor reserves the right to inspect the work,[21] and even

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ifornia statute which went into effect Jan 1, 1918, has the following provision: "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act. The term "independent contractor" shall be taken to mean, for the purposes of this act any person who renders service, other than manual labor, for a special recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which the result is accomplished." Cal. Stats. 1917, ch. 586, § 8 (b). See note, 19 Ann. Cas. 1, for a very exhaustive discussion of all phases of this question.

[15] Brown v. Industrial Acc. Com., n. 14, supra; Thompson v. Twiss (1916), 90 Conn. 444, 97 Atl. 328; Powley v. Vivian & Co. (1915), n. 14 supra.

[16] Labatt, Master and Servant (2nd ed.), § 18 suggests this rule, which also finds support in Brown v. I. A. Com. n. 14 supra.

[17] Tucker v. Cooper (1916), 172 Cal. 663, 158 Pac. 181; Tuttle v. Embury-Martin Lumber Co. (1916), 192 Mich. 385, 158 N. W. 875.

[18] Claremont Country Club v. Ind. Acc. Com. (1912) 53 Cal. Dec. 205, 163 Pac. 209, (Caddy at golf links injured while under direction of member); Powley v. Vivian & Co., n. 14, supra; Kellogg v. Church Charity Foundation (1911), 203 N. Y. 191, 197, 96 N. E 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913 A 883.

[19] Cameron v. Pillsbury (1916), 173 Cal. 83, 159 Pac. 149, (A real estate agent does not cease to be a servant because allowed to go out into the country alone to solicit new business).

[20] Brown v. Ind. Acc. Com., supra, n. 14; Maughlelle v. J. H. Price and Sons (1916), 99 Kas. 412, 161 Pac. 907.

The following statement by Shearman and Redfield, Negligence (5th ed.), § 165, or words very similar, is widely used: "The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished."

[21] Green v. Soule (1904), 145 Cal. 96, 78 Pac. 337; Bokoshe Smokeless Coal Co. v. Morehead (1912), 34 Okl. 424, 126 Pac. 1033.

to stop improper work.[22] Among the circumstances which furnish the evidence necessary to determine whether one was under the control of an employer or not are the mode of payment, which is of slight importance,[23] the nature of one's business training,[24] and general qualifications for independent work.[25] The untrained manual laborer cannot now be an independent contractor in California.[26] Another feature to consider is whether one is subject to immediate discharge.[27] It is also important to inquire where the work was done and for whose benefit;[28] who furnished the equipment;[29] who had the right to hire and control assistants;[30] and whether the employer is entitled to all of the other person's time and to regulate the hours of labor.[31] The intention of the parties is not controlling, for it is the actual relationship that governs.[32] A contract of employment is unnecessary in California, an appointment of hire being sufficient,[33] and although a contract exists, it does not necessarily govern, for the subsequent acts of the parties may have fixed the relationship.[34] Again, the same person may be an independent contractor for one purpose in his relationship with another, and a servant for another purpose in his relations with the same person.[35] In the principal case[36] the injured man was the driver of a bakery wagon belonging to the owner of the business. The driver worked on a commission basis with a guarantee of fifteen dollars per week, but had to return all commissions in excess of fifteen dollars. He chose his own time to go out and return, and was not directed where to go. He performed other work for the bakery, however, without receiving additional pay. He was injured by falling from the wagon. There

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[22] Marion Shoe Co. v. Eppley (1914), 181 Ind. 219, 104 N. E. 65

[23] Claremont Country Club v. I. A. C., supra n. 18 (a servant may even pay for the privilege of working and only on "tips"); Brown v. Ind. Acc. Com., supra, n. 14, (payment by commission, piece, or day is only slight evidence).

[24] McCoy v. Kirkpatrick, supra n. 10; Southern Cotton Oil Co. v. Wallace (1899), 23 Tex. Civ. A. 12, 54 S. W. 638.

[25] Mullich v. Brocker (1905), 119 Mo. App. 332, 97 S. W. 549. This case goes to the extent of holding that an unskilled workman, i. e., one with no special qualifications or training, cannot be an independent contractor.

[26] Cal. Stats. 1917, ch. 586, § 8 (b). See n. 3, supra.

[27] Crudup v. Schreiner (1901), 98 Ill. App. 337.

[28] Labatt, Master and Servant, p. 69.

[29] McCoy v. Kirkpatrick, supra, n. 10; Donlon Bros. v. Ind. Acc. Com., supra, n. 11.

[30] McCoy v. Kirkpatrick, supra n. 10.

[31] Southern Cotton Oil Co. v. Wallace, supra n. 24.

[32] Hartman v. Ralston Iron Works (1917), 4 Cal. I. A. C. 13, Bull. No. 1.

[33] Hartman v. Ralston Iron Works, supra n. 32; Cal. Stats. 1917, ch. 586, § 8 (a).

[34] Brown v. Ind. Acc. Com., supra n. 14.

[35] Powley v. Vivian and Co., supra n. 14.

[36] Easton v. Industrial Acc. Com., supra n. 5.

seem to be no sufficient reasons for disagreeing with the decision that the injured man was an employee, for he contributed nothing but his bare personal service and was merely allowed some freedom in disposing of the bread. A detailed study of the evidence reveals nothing more than an apparent attempt to evade the compensation law by giving the unfortunate driver some freedom of action without really making him in any way independent. Again, it is doubtful if under California's new law the injured man could under any circumstances be an "independent contractor," since he would probably be considered a manual laborer.[37]

D. J. W.

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[37] Supra n. 3.

Book Reviews

CASES ON FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS. By Albert M. Kales. West Publishing Company, St. Paul, Minn. 1917. pp. xxvi, 1456. $6.00.

Mr. Kales' casebook is designed for use in law schools where two hours a week for an entire year can be devoted to the subject of future interests. The questions arising in this branch of property law are, as the editor says, those "more commonly met with in litigation, about which lawyers in general know the least, and where academic knowledge and analysis are of great importance in handling cases." But it is probably not likely that many law schools will be found willing to give the time necessary for a thorough study of this difficult, interesting and generally little understood subject. Its fate in the law curriculum is comparable with that of Greek in the academic. Perhaps as courses in Greek are now being given without any requirement of a knowledge of the language, so too the course in future interests may have to be given in a less intensive and scholarly manner than the subject really requires. Yet there is hardly any part of the law where the practitioner's acumen or legal instinct is of less service than in this field. The property lawyer, as Sir Frederick Pollock has said, unlike a poet, *non nascitur sed fit.* But with the new learning asking a place in the lists of courses, and with such subjects as constitutional law, conflict of laws, evidence, corporations and the law of public service already demanding the attention of the third-year student, he must perforce jettison some of the cargo. A "little learning" in the classics or a course for the select few is all that most schools can afford to offer.

Where the necessary time can be devoted to the subject, Mr. Kales' book is the best that can be used. One cannot usually